RECORD AND BRIEFS

Supreme Court, U.S.
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No. 17-2

IN THE

Supreme Court of the United States

IN THE MATTER OF A WARRANT TO SEARCH A CERTAIN E-MAIL ACCOUNT CONTROLLED AND MAINTAINED BY MICROSOFT CORPORATION

UNITED STATES OF AMERICA,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION

Bradford L. Smith
David M. Howard
John Frank
Jonathan Palmer
Nathaniel Jones
MICROSOFT CORPORATION
One Microsoft Way
Redmond, WA 98052

James M. Garland
Alexander A. Berengaut
COVINGTON & BURLING LLP
850 10th Street, NW
Washington, DC 20001

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
Brian P. Goldman
Evan M. Rose
Hannah Garden-Monheit
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Respondent

Library of Congress
Law Library

SUPPLEMENTAL BRIEF IN OPPOSITION

Microsoft submits this supplemental brief under Supreme Court Rule 15.8 to alert the Court to new developments in the ongoing bipartisan legislative efforts to update the Stored Communications Act (SCA).

As Microsoft explained in its brief in opposition (at 14-26), this Court's review would short-circuit an ongoing bipartisan legislative effort to update the SCA to account for the modern reality of global data storage in the "cloud"—an effort in which Congress is exercising its exclusive prerogative to choose when and how U.S. law extends overseas. Microsoft noted, for example, that the International Communications Privacy Act (ICPA) had recently been introduced in the Senate by Senator Hatch (R-Utah) and Senator Coons (D-Del.). BIO 15 (citing S. 1671, 115th Cong. (2017)). Senator Heller (R-Nev.) has cosponsored the bill as well.

The legislative process continues to move forward apace. In addition to the Senate's consideration of ICPA, the House is now also actively considering the bill. On September 8, 2017, ICPA was formally introduced in the House. *See* H.R. 3718, 115th Cong. (2017). A bipartisan group of Members of Congress cosponsored the bill. Representatives Doug Collins (R-Ga.), Hakeem Jeffries (D-N.Y.), Suzan DelBene (D-Wash.), and Darrell Issa (R-Cal.) have now added their voices to the bipartisan chorus calling for prompt congressional action.

Representative Collins explained that "the courts have made it clear that the time for Congress to act in this space has come." Rep. Doug Collins, *Collins Introduces Bill to Update International Privacy Law for the Cloud* (Sept. 12, 2017), https://perma.cc/H9UK-USAL. He emphasized that ICPA would resolve the "[i]nternational conflicts of law [that] have put U.S. electronic communications service providers in the position of having to choose which country's codes to violate because they often store information in servers located throughout the world," while "also safeguard[ing] American data housed in servers outside the U.S. by requiring warrants from domestic law enforcement investigating criminal acts as well as reciprocity from foreign governments involved in such cases." *Id.*

Representative Jeffries stressed Congress's unique ability to enact nuanced legislation. He observed that "[f]ailing to address this issue in a reasonable, comprehensive way will only continue to cause problems between American businesses and the U.S. government," while "ICPA will aid US law enforcement while safeguarding consumer privacy, striking a much-needed balance in today's data-driven economy." *Id.*

Representative Issa emphasized that addressing the "conflict created between different legal systems ... is a matter that must be handled by Congress and not left to judges relying on decades old statutes." *Id.*

And Representative DelBene noted that ICPA was necessary to "[u]pdat[e] our laws to reflect the way the world works in the 21st century." *Id.*

This continued and building momentum toward a bipartisan legislative solution refutes the Government's assertion that "a legislative remedy is entirely speculative." Pet. 31 (quoting Pet. App. 137a n.37 (Cabranes, J., dissenting)); *see also* Reply Br. 2, 10-11. And the Government's suggestion (Reply Br. 10) that there is no "consensus on *how* the statute should be revised" is belied by the growing consensus that ICPA—the only proposal that has been introduced in either chamber—would appropriately balance the law enforcement needs against the sovereign interests of our sister nations, the privacy of U.S. citizens, and the U.S. technology industry's global competitiveness.

"The presumption against extraterritoriality guards against our courts triggering ... serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). Where the legislative process is already moving forward on a solution that is uniquely within Congress's province to craft, the case for deference is even stronger. This Court should not now insert itself into and disrupt that process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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